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AUG 17 2005

OFFICE OF PETITIONS

In re Application of
Gerd W. KRÄMER
Application No. 09/704,803
Filed: November 2, 2000
Title of Invention:
AUTOMATIC PROGRAMMING

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ON PETITION

This is a decision on the twice renewed petition under 37 CFR 1.137(a)¹, filed April 8, 2005, to revive the above identified application.

The renewed petition is **GRANTED**.

This application became abandoned January 28, 2004 for failure to timely pay the issue fee on or before January 27, 2004. A petition to revive was filed October 21, 2004 and the fee for the petition was received October 27, 2004. The petition was dismissed in a decision mailed November 17, 2004 because the petition lacked the proper issue fee. A renewed petition was filed November 30, 2004 and was dismissed in a decision mailed February 8, 2005 because the fee for the issue fee still had not been remitted in the statutory amount. It appears that the wire transfer agency used to transmit the funds from Germany to the United States deducted a wire transfer fee and thus the amount received in the USPTO was deficient.

Comes now the instant petition with the balance due of \$26.00 and the petition is being treated on its merits with respect to the unavoidable delay in paying the issue fee.

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have

¹A grantable petition under 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed; In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(l);

(3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.²

Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure or mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.³

Petitioner argues a financial inability to pay the issue fee when it was due January 27, 2004. In support of the argument, petitioner references a "rescript from the social welfare office" to prove petitioners ability or inability to pay the issue fee when due.

The requirement for proof of financial hardship is a complete showing of petitioner's, or the party responsible for payment of the maintenance fee's, financial condition including all income, expense, assets, credit, and obligations which made the delay unavoidable. Petitioner has provided copies of the "rescript" and of his bank statement. The rescript is a statement of entitlement to receive social welfare benefits and shows the amount of the monthly benefit. The bank statement, although in German with some English translation and although it quotes the currency in pounds versus U.S. dollars, shows the amount of the rescript as a deposit and of amounts deducted for expenses such as Rent and Electricity.

Petitioner indicates that he has been dependant upon "social welfare" since 2002 and the proof submitted covers a period prior to the date the issue fee was due, 2003, through

²In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

³Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

2004. Petitioner has even showed that the social welfare benefit was not at times enough to cover his living expenses and that he had to make alternative living arrangements. This information was offered to show that his failure to pay the issue when it was due to an financial inability to do so and that the delay in paying the issue fee was "unavoidable".

Considering the facts and circumstances of this case, in this instance, it is concluded that petitioner has now made an adequate showing of "unavoidable delay within the meaning of 37 CFR 1.137(a).

This matter is being referred to the Publishing Division to be processed into a patent.

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.

A handwritten signature in black ink, reading "Patricia Faison-Ball". The signature is written in a cursive, flowing style with a large, prominent "P" and "B".

Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions